

KRONENBERGER BURGOYNE, LLP
150 Post Street, Suite 520
San Francisco, CA 94108
www.KronenbergerLaw.com

KRONENBERGER BURGOYNE, LLP

Henry M. Burgoyne (CA Bar No. 203748)
Karl S. Kronenberger (CA Bar No. 226112)
Jeffrey M. Rosenfeld (CA Bar No. 222187)
Margarita Calpotura (CA Bar No. 244711)
150 Post Street, Suite 520
San Francisco, CA 94108
Telephone: (415) 955-1155
Facsimile: (415) 955-1158
hank@kronenbergerlaw.com
karl@kronenbergerlaw.com
jeff@kronenbergerlaw.com
margarita@kronenbergerlaw.com

Attorneys for Defendant Member Source Media, LLC.

Jason K. Singleton, State Bar #166170

jason@singletonlawgroup.com

Richard E. Grabowski, State Bar # 236207

rgrabowski@mckinleyville.net

SINGLETON LAW GROUP

611 "L" Street, Suite A

Eureka, CA 95501

(707) 441-1177

Fax: 441-1533

Attorney for Plaintiff, ASIS INTERNET SERVICES

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ASIS INTERNET SERVICES, a California
corporation,

Plaintiff,

vs.

MEMBER SOURCE MEDIA, LLC, et al.,

Defendants.

Case No. CV-08-1321-EMC

JOINT DISCOVERY PLAN

Pursuant to Rule of Civil Procedure 26(f)(3), and the Court's direction, Plaintiff ASIS Internet Services ("ASIS") and Defendant Member Source Media, LLC ("Member Source") submit this Joint Discovery Plan.

I. What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made.

A. Member Source's Statement.

The parties have exchanged initial disclosures pursuant to Rule of Civil Procedure 26(a). Member Source served its initial disclosures on ASIS on June 4, 2008. ASIS served its initial disclosures on Member Source on June 11, 2008. ASIS, which claims that the addresses to which Member Source sent the alleged emails ("Emails") are confidential corporate information, has yet to produce versions of the Emails containing such addresses. If and when ASIS does produce complete versions of the Emails, ASIS is expected to designate such addresses as "Confidential" and/or "Highly Confidential-Attorneys' Eyes Only." Of course, any such designation would make it extremely cumbersome or impossible for Member Source to gather information, including from third parties, relating to the Emails, in particular as concerns any expression of affirmative consent by the owners/operators of such addresses to receive the Emails. Member Source will raise the designation issue with the Court as soon as is practicable.

B. ASIS's Statement.

A confidential designation would allow Defendant's employees, experts and technical staff access to the unredacted emails.

II. The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

A. Member Source's Statement.

In its Order Granting Defendant's Motion for Security for Costs; and Setting Case Management Schedule [Docket No. 7] (the "Order"), the Court set forth the parameters of

1 discovery to take place during the first phase of this action. The only remaining issue
2 concerns depositions, specifically the handling of witnesses with knowledge of both
3 ASIS's alleged standing and other merits issues. Member Source has identified at least
4 four such witnesses, to include ASIS owners Nella White and Rex White, ASIS employee
5 Sally Then, and ASIS's accountant (whom ASIS described in prior litigation but failed to
6 specifically identify). During the parties' June 11 case management conference, the
7 Court suggested that ASIS permit Member Source to conduct two-part depositions of
8 such witnesses—the first part (regarding standing) to take place during the initial phase
9 of this litigation and the second part (regarding all other merits issues) to take place later.
10 Accordingly, Member Source requests that the Court issue a discovery order permitting
11 Member Source to conduct two-part depositions of the four witnesses set forth above.

12 In the meet and confer over this discovery plan, ASIS for the first time suggested
13 that it be permitted to propound additional discovery concerning the involvement of third
14 party "affiliates" in the sending of the Emails. Member Source strenuously objects to
15 ASIS's proposed "affiliate" discovery, insofar as any investigation as to the source of
16 each of 5,000-plus emails, few if any of which were sent by Member Source, would
17 create an extraordinary amount of work for Member Source, thus defeating the purpose
18 of bifurcation. ASIS's proposed additional discovery is a thinly-veiled fishing expedition
19 aimed at gathering information for use in filing future CAN-SPAM lawsuits.

20 **B. ASIS's Statement.**

21 Plaintiff is not opposed to Defendant taking two depositions prior to the
22 proposed dispositive motion, and that such testimony be limited to standing
23 issues, or that Defendant have the opportunity to depose such witnesses a
24 second time on all other issues after the question on standing is resolved.

25 Plaintiff has propounded 7 subpoena's prior to the Court's issuing its order
26 on Security on Costs. This was done with Defendant's advance notice and
27 consent.
28

1 Defendant has been provided with the emails at issue in this litigation in
2 redacted format. Plaintiff requests leave to propound five very simple
3 interrogatories to determine whether Defendant can identify which of its affiliates
4 sent the subject emails, or simply a statement under oath that it cannot identify
5 which affiliates sent the emails.

6 **III. Any issues about disclosure or discovery of electronically stored**
7 **information, including the form or forms in which it should be produced.**

8 **A. Member Source's Statement.**

9 Based on ASIS's document production in *ASIS v. Optin Global, et al.*, No. 05-
10 5124, Member Source has serious concerns about the efforts taken by ASIS to preserve
11 relevant documents existent at or after the time ASIS decided to file this lawsuit. In
12 particular, Member Source is concerned that ASIS has failed to preserve email server
13 logs, spam filter and virus scanning logs, server configuration data, remote user access
14 logs, and other information obviously relevant to the issues of, without limitation, ASIS's
15 receipt of, and adverse effects allegedly caused by, the Emails. Member Source
16 requests that the Court issue a preservation order requiring ASIS and its contractors,
17 attorneys and other agents to preserve all electronic documents that may prove relevant
18 to any claim or defense in this case.

19 **B. ASIS's Statement.**

20 There is no substance to Defendant's argument that Plaintiff failed to
21 preserve evidence in the *Optin Global* matter. Defendant should at least identify
22 what evidence it has concerns about before requiring the Court consider such a
23 protective order. Moreover, the law itself contains doctrines designed to address
24 such concerns.

25 **IV. Any issues about claims of privilege or of protection as trial-preparation**
26 **materials, including — if the parties agree on a procedure to assert these claims**
27 **after production — whether to ask the court to include their agreement in an order.**
28

1 The parties agree that disclosure and discovery in this case will likely involve
 2 production of confidential, proprietary, or private information for which special protection
 3 from public disclosure is warranted. The parties intend to submit a Stipulated Protective
 4 Order to the Court for its approval.

5 **V. What changes should be made in the limitations on discovery imposed**
 6 **under these rules or by local rule, and what other limitations should be imposed.**

7 The parties have agreed that discovery will comply with the Federal Rules of Civil
 8 Procedure and agree that with the exception of the proposed discovery schedules set
 9 forth above, there should be no need at this time to impose additional limitations on the
 10 subject matter or timing of discovery in this case.

11 **VI. Any other orders that the court should issue under Rule 26(c) or under Rule**
 12 **16(b) and (c).**

13 **A. Member Source's Statement.**

14 As directed by the Court, the parties have discussed a stay of this case pending a
 15 resolution of the appeal relating to *ASIS v. Optin Global*. Thus far, ASIS has refused to
 16 stipulate to a stay. Member Source believes a stay of this action is entirely appropriate
 17 because: 1) almost any construction of CAN-SPAM will foreclose ASIS's alleged
 18 standing; 2) litigation of just the standing issue in this case will cost the parties, in
 19 particular Member Source, scores of thousands of dollars in attorneys' fees; 3) ASIS's
 20 concerns regarding the preservation of evidence can be satisfied by much less
 21 burdensome and expensive means, such as preservation orders.

22 In another ASIS CAN-SPAM case, *ASIS v. Azoogole.com, Inc.*, No. C-07-4630
 23 JCS, Judge Spero recently stated his intention to stay that litigation pending outcome of
 24 the *ASIS v. Optin Global* appeal. ASIS responded by voluntarily agreeing to dismiss
 25 *ASIS v. Azoogole*, in its entirety, with prejudice. (*ASIS v. Azoogole* had previously been
 26 stayed by Judge Patel, in November 2007, pending a resolution of *ASIS v. Optin Global*.)
 27 ASIS attempts to distinguish this case from *ASIS v. Azoogole* on the ground that discovery
 28 in *ASIS v. Azoogole* would have been futile, given the passage of time. That distinction

1 lacks all credibility, given that the first of the Emails at issue here were sent in March
2 2006, just three months after the first emails at issue in *ASIS v. Azoogole*. If it were too
3 late for discovery in *ASIS v. Azoogole*, then it is too late for discovery here.

4 ASIS and Member Source will submit a joint letter on the issue of a stay, as
5 directed by the Court. In the event that ASIS and Member Source are unable to reach
6 agreement, Member Source will seek leave of the Court to file a motion to stay.

7 **B. ASIS's Statement.**

8 The *ASIS v. Azoogole.com, Inc.*, No. C-07-4630 JCS matter has already
9 been stayed for a year. As a result, electronic data in the possession of third
10 parties and which Plaintiff needed for prosecution of the action, probably no longer
11 exists. Hence, Plaintiff's offer there to dismiss for a waiver of costs. If this matter
12 is stayed pending the appeal in *Optin Global*, the likelihood of tracking down the
13 senders of the subject emails and establishing their relationship to Defendant
14 becomes remote. It is not uncommon for various District Courts to have divergent
15 views on complex questions of law. If each time this occurred, all related cases
16 were stayed pending the outcome of an appeal in any one case, there would be a
17 considerable number of stayed matters. Justice delayed is justice denied.
18 Moreover, the parties and the Court have contemplated and effected a plan to
19 hear the standing question in an expedited manner. If Defendant prevails,
20 Defendant will have their stay pending appeal.

KRONENBERGER BURGOYNE, LLP
150 Post Street, Suite 520
San Francisco, CA 94108
www.KronenbergLaw.com

1 DATED: July 3, 2008

KRONENBERGER BURGOYNE, LLP

2
3 By: /s/ Henry M. Burgoyne

4 Henry M. Burgoyne, III

5 Attorney for Defendant Member Source
6 Media, LLC
7

8 DATED: July 3, 2008

SINGLETON LAW GROUP

9
10 By: /s/ Jason K. Singleton

11 Jason K. Singleton

12 Attorney for Plaintiff ASIS Internet Services
13
14
15
16

17 **ATTESTATION OF CONCURRENCE IN FILING**

18 Pursuant to N.D. Cal. General Order No. 45, section 45 X(B), I, Henry M.
19 Burgoyne, III, hereby attest that the concurrence to the filing of this Joint Discovery
20 Report has been obtained from Counsel for Plaintiff who has provided the conformed
21 signature above.
22

23 DATED: July 3, 2008

KRONENBERGER BURGOYNE, LLP

24
25 By: /s/ Henry M. Burgoyne

26 Henry M. Burgoyne, III

27 Attorney for Defendant Member Source
28 Media, LLC